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KING'S ESTATE. GAST'S APPEAL.[1]

A receipt was given in the following words: "Received this day from Ann Charlotte Gast the sum of $1 for all my services rendered her in her house up to this date; and I agree to let the legacy in her favor in my will as now made, stand and remain for her benefit at my death." The paper was signed and witnessed. *Held*, it is insufficient to establish such a contract as can be enforced against her estate, when it appears that the will in existence at the time the receipt was given has been destroyed or revoked.

There was nothing in the paper itself, nor in the evidence *dehors* the instrument to show the legacy was promised in consideration of services previously rendered or to be performed.

Such a contract can only be enforced, when upon a sufficient consideration, and clearly proved by direct and positive testimony, and where its terms are definite and certain.

Opinion by STERRETT, J.

Although on its face it would appear unreasonable that a man should be permitted, by contract, to limit the disposition of his property by will, a little reflection convinces us, not only of the propriety of the rule, but that it follows logically from the view taken by the law of all contracts, whereby a man disposes of that which is his own.

There can be no doubt of the abstract proposition that a person may enter into a valid agreement to make a will in a particular manner, or what is the same thing, not to make any will at all. The cases have so held from the earliest time. In Guilmer *v.* Battison, 1 Vernon 48, decided by Lord KING, in 1682, the contract was: "If I die without issue of my body, I will give you either £500, or leave you my land." The agreement was insisted upon, and the Court decreed that it be enforced: Jones *v.* Martin, 3 Amb., 882; Fenton *v.* Embers, 3 Burr., 1278; Fortescue *v.* Hannah, 19 Vesy, 67; Johnson *v.* Hubble, 5 AM. LAW REG. 177; Rivers *v.* Rivers, 1 Dessau., 116; Newton *v.* Newton, 46 Minn., 33; Thompson *v.* Stevens, 71 Pa. St., 161.

[1] 150 Pa. St., 143; 30 W. N. C., 439. July 13, 1892.

The main difficulty arises in satisfactorily proving such contracts; and when proved, in applying a satisfactory remedy. The law has always held in abhorrance an attempt to charge a decedent's estate with contracts of a surpressed or private nature entered into during his life, and courts have always required proof of a very positive character to support them. This feeling is due to the inclination which exists among survivors, who are, perhaps, disappointed with the disposition which the deceased has made of his property, to recover as large a share of his estate as possible under the guise of assumed contracts and agreements entered into during his life. Also to the difficulty of denying such contracts when alleged, owing to the death of one of the most interested parties. This disposition of the court was well expressed by Justice STRONG, in Graham *v.* Graham (*post*), where he says: "The temptation to set up claims against the estates of decedents, particularly such decedents as have no lineal heirs, is very great. It cannot be doubted that many such claims have been asserted which would never have been known, had it been possible for the decedent to meet his alleged creditors in a court of justice. Not infrequently we witness a scramble for a dead man's effects, disreputable to those engaged in it, and shocking to the moral sense of the community. Such claims are always dangerous, and when they rest on parole evidence, they should be strictly scanned."

Covenants to make a stipulated disposition of property by will have long been used in England in marriage settlements, where a person will covenant either to give a certain amount by will or otherwise, or that his executors, at a certain time after his decease, will pay a particular amount to the covenantee: Mayd *v.* Field, L. R., 3 Ch. D., 587; Bold *v.* Hutchinson, 20 Bev., 250.

But where it is sought so to hold a third person liable for representations made on marriage, they must be clearly proved, and it must appear that the marriage took place upon the faith of them: Bold *v.* Hutchinson (*ante*); Jamison *v.* Stein, 21 Bev., 5.

In America such settlements are not much used, and the cases upon contracts to make a will have generally arisen under different circumstances.

The Contract.—It is most important, where relief is sought for the breach of a contract to make a will, that it be fully proved. It must appear to have been a clear understanding between the parties, and deliberately entered into and understood by them. It is said in Fry on Sp. Per., § 223, "such contracts are regarded with suspicion, and will not be sustained except upon the strongest evidence that it was founded upon a sufficient consideration, and was the deliberate act of the deceased:" Drake *v.* Lanning, 24 Atlantic, 378; Newton *v.* Newton, 46 Minn., 33.

But certainty to a common intent will be sufficient, and where a person makes such representations as will in law amount to an offer, which are acted upon by the other party, a binding contract will be created: Thompson *v.* Stevens, 71 Pa. St., 161.

Thus, in Hammersly *v.* De Biel, 12 Cl. and Fin., 45, the agent of the father wrote to the gentleman

who was about to marry his daughter, "The father also intends to leave the sum of £10,000 in his will to Miss T. This arrangement is subject to revision, but it is sufficient for the Baron B. to act upon." He did act upon it, and the marriage was solemnized. *Held*, that the estate of the father was bound by the contract: Bold *v.* Hutchinson, 20 Bev., 250; Jamison *v.* Stein, 21 Bev., 5.

Exactly what proof is necessary in a particular case is of considerable difficulty to state, but the rule is about the same as in any other contract except that the court will be more particular, and require stronger evidence where it is to make a will than in ordinary cases: McClure *v* McClure, 1 Pa. St,, 374; Mundorf *v.* Kilbourn, 4 Md., 459.

It has been said "The burden of proving such a contract and showing its exact terms is upon the party asserting it:" 11 Pa. C. C., 493.

Quite a line of cases has arisen upon contracts that, if the plaintiff will live with the deceased and care for him during life, he shall have certain property at his death. Such claims are particularly obnoxious to the courts, especially since the proof which is generally produced is of the most unsatisfactory character. "Courts," said Justice SHARSWOOD, in Thompson *v.* Stevens (*ante*), "by which the estates of deceased persons are called upon to pay large sums to nurses and housekeepers, ought to be very closely scanned, and juries instructed that they can only be made out on very clear proof. Courts are especially justified in setting aside such verdicts when not founded upon proof of this character, or when unreasonable in amount." Such a case was Graham *v.* Graham, 34 Pa. St., 475. The deceased, being old, promised his nieces that if they would live with him till he died he would "give them as much as any relation he has on earth," without suggesting what that amount would be. The mother gave testimony as to the conversation with the uncle at the time the alleged contract was made, which tended to prove it; and another witness testified to admissions by the deceased of having made such a contract. They were all of a loose and rambling nature, and the court refused to enforce it, saying it was too uncertain. In Cessna *v.* Miller, 51 N. W., 50 (Ia., 1892), the action was to recover a farm on the ground that the deceased had promised that if plaintiff lived with her and took care of her she should have it at her death. Several witnesses testified to statements by the deceased to the effect that the plaintiff was to have the farm. But the court held it insufficient to establish any binding contract. To the same effect are: Pollock *v.* Ray, 85 Pa. St., 428; Walls' App., 111 Pa., 460.

But where the evidence reaches the degree of certainty required by the court, or, as has been said, where the evidence is "direct and positive," the necessary relief will be granted, for although the strict rule has been found expedient in order to protect the estates of deceased persons, it will not be permitted to work an evil upon those who have entered into an honest contract with him: Thompson *v.* Stevens, 71 Pa. St., 161; Cottrell's Estate, 2 W. N. C., 237.

These cases are only a step removed from those where the services are rendered simply on the

hope of reward by will, and without any agreement for compensation at all. Such claims are never allowed and no recovery can be had for such gratuitous services: Osbourne *v.* Guy's Hospital, 2 Strange, 239; Martin *v.* Wright, 13 Wend., 460; Mullin's Estate, 136 Pa. St., 239.

Like all other contracts, an agreement to make a testamentary disposition of property must conform to the Statute of Frauds, so that a contract for the disposition of land by will, to be enforceable must be in writing, or must avoid the statute on the ground of part performance: Harder *v.* Harder, 2 Sanf. Ch., 19; Johnson *v.* Hubble, 5 AM. LAW REG., 177; Brinker *v.* Brinker, 7 Barr., 53; Gould *v.* Mansfield, 103 Mass., 408; Drake *v.* Lanning, 24 Atl. Rep., 378.

But if the contract can be colected from the letters which have passed between the parties, the statute will be satisfied: Hammersley *v.* De Beil, 12 C. & F., 45; Austin *v.* Davis, 128 Ind., 473.

So, too, the will itself executed in pursuance of an agreement, may operate as a writing within the statute. It is merely a will, however, and revocable during the life of the maker, unless possession be taken under it, and the plaintiff fulfill his part of the agreement, in which case it amounts to an executed contract, which is irrevocable and may be enforced even during the life of the maker: McCue *v.* Johnson, 25 Pa St., 306; 34 Pa. St., 180; Tuitt *v.* Smith, 127 Pa. St., 341; 137 Pa. St., 35: Brinker *v.* Brinker, 7 Pa. St., 53.

The doctrine of part performance as a method of avoiding the hardships which would be occasioned by strict enforcement of the Statute of Frauds, has been universally applied to this class of contracts, but what is a sufficient part performance in a particular case is a harder question. As before stated, the contract must be clearly proved, and the acts set up to take it out of the statute must be "unequivocally in performance of the contract," and referable thereto: Carlisle *v.* Flemming, 1 Harrington, 421.

In England it has been held that marriage entered into upon the promise of the deceased that he would by will give the plaintiff certain property is not sufficient to take the case out of the statute. This was ruled in Caton *v.* Caton, L. R., 1 Ch. App., 137; L. R., 2 H. L. C., 127. Where negotiations for a settlement were broken off upon the promise by the deceased that he would by will give his wife all her property. The marriage was solemnized upon this promise, but the husband died without having made the will agreed upon. The court held that the contract was within the English statute requiring that a contract upon the the consideration of marriage must be in writing, and that the marriage was not sufficient part performance to take the case out of it, and, therefore, the contract could not be enforced: Coals *v.* Pilkington L. R., 19 Eq., 174.

This decision rests upon the peculiar provisions of the English statute, which would be rendered meaningless by any other conclusion. Generally, in the United States, this clause is not in force, and the rule would probably be different were a similar case to arise.

Where the agreement is that if the plaintiff will work the farm during the life of the deceased, it

shall be given to him at his death, and relying upon this promise the plaintiff enters into possession and cultivates the farm, and expends money upon it, he will be entitled to specific performance of the contract, even though it be not in writing: Brinker *v.* Brinker, 7 Pa. St., 53; Young *v.* Young, 45 N. J. Eq., 27; Smith *v.* Pierce, 25 Atl. Rep., 1092 (Vt.).

But the mere expenditure of money alone will not take the case out of the statute, unless it be clearly in pursuance of an express contract: McClure *v.* McClure, 1 Pa. St., 374.

So if the contract be that if the plaintiff will live with the promissor for a certain time, and he do so, the contract will be enforced. Not only so, but where the contract was made between the deceased and the parent of an infant child, the court will enforce it in favor of the child. Such a case was Van Duyne *v.* Vreeland, 11 N. J. Ch., 370; 12 id., 142. The father of an infant child orally agreed with its uncle that the child should live with the uncle during his life, and that he should receive all the uncle's property upon the death of himself and wife. The child lived with the uncle twenty-three years, and the uncle having made a conveyance clearly in fraud of the agreement the court set it aside, and granted specific performance of the original contract. The contract, although parole, was taken out of the statute by the infant having performed his part of it. The same conclusion was reached in Sharkey *v*, McDermott, 91 Mo., 647; Van Tine *v.* Van Tine, 13 Central Rep., 354.

Directly opposed to these is the decision in Austin *v.* Davis, 128 Ind., 473, decided in 1891. An infant was adopted by a man, with his wife's consent, in pursuance of a contract so to do, and to leave her all his estate at his death. The deceased made a *bona fide* conveyance of all his property to his wife, and shortly after died. The wife renewed the promise by parole, but died without making any such disposition. *Held*, the contract was within the Statute of Frauds, and although the infant had lived with the deceased according to the agreement, it constituted no such part performance as would avoid the statute. The decision, however, is confessedly upon the former cases in the same State, and no outside authorities are cited to support it, so it can hardly be considered as affecting the general rule, especially as the doctrine of part performance is, as a whole, recognized.

Where two parties agree to make mutual wills, and one dies without either will having been revoked, or the contract having been discharged, the other party will not be permitted to make a different disposition of his property from that agreed upon. Williams on Ex. (6 Am. Ed.), 12 and 13, 162–3.

In such a case, where, after the death of one of the contracting parties the other made a different will, Lord CAMDEN, in giving relief to the injured parties, made use of the following language, which would seem to express the true reason of the rule: "It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies carries his part of the contract into execution. Will the court afterward permit the other to break the contract? Certainly not." Dufour *v.* Pereira, 1 Dick., 419.

A similar case arose in Lord Wal-

pole *v.* Lord Orford, 3 Vesy Jr., 402, and the relief prayed was denied because of the general uncertainty of the case, and not from any objection to the theory.

So in Carmichael *v.* Carmichael, 72 Mich., 76, the agreement to make mutual wills was parole between husband and wife, and the husband died leaving a will made in pursuance of the contract. The wife, having accepted the provisions of the husband's will, was restrained from doing any act whereby it would be impossible for her to carry out her part of the agreement, upon the express grounds that "Having accepted the terms of the husband's will, the contract was sufficiently part performed to be taken out of the statute of frauds." But the mere making of a will in pursuance of such a contract will not be sufficient part performance to prevent a revocation by either party during their joint lives: Gould *v.* Mansfield, 103 Mass., 408.

Consideration.—Like all other enforceable contracts, whether or not within the Statute of Frauds, a contract to make a will must be on a sufficient consideration, either by way of advantage to the one party or detriment to the other: Drake *v.* Lanning, 24 Atl., 378; McClure *v.* McClure, 1 Pa. St., 374; King's Estate (principal case).

Any valuable consideration will be sufficient, and this will include marriage: Robinson *v.* Ommanney, L. R., 21 Ch. D., 78, C. A., 23 Ch. D., 285; Johnson *v.* Hubble, 5 AM. LAW REG., 177; Caton *v.* Caton, L. R., 1 Ch. App., 137.

So services rendered, or to be rendered will be sufficient: Snyder *v.* Castor, 4 Yeats, 353.

And in the case of an agreement to make mutual wills, the reciprocal promises will be sufficient: Carmichael *v.* Carmichael, 72 Mich., 76.

In short, the rule laid down by Lord COTTONHAM in Hammersly *v.* De Beil (*ante*), would seem satisfactory. It is: "A representation made by one party, for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representations:" Coals *v.* Pilkington, L. R., 19 Eq., 174.

In Ridley *v.* Ridley, 11 Jur. N. S., 475, the plaintiffs sold land to "A," who was the partner of the deceased, upon the promise of deceased that he would give the plaintiffs the value of the land in his will. This he failed to do, and Sir JOHN ROMILLY held, that since the contract was clearly proved, and it appeared that for various reasons the deceased was anxious to have the sale made, that the consideration was sufficient, and the contract would be enforced. So in Van Duyne *v.* Vreeland (*ante*), a child having gone to live with an uncle upon the understanding that he was to receive the uncle's property at his death, the giving up of his interest in his own father's estate was held to be a sufficient consideration to support the promise: Hedley *v.* Simpson, 20 S. W., 881.

A much stricter rule, however, was laid down by the Court of Chancery of New Jersey in Drake *v.* Lanning, 24 Atl., 378. The contract was that if the plaintiff would continue to live upon the farm, and find a purchaser for a first mortgage there was upon it, the deceased would, by her will, release a second

mortgage, which she held, and also provide funds to pay the said first mortgage. The plaintiff accordingly fulfilled her part of the contract, but the deceased failed to make the proper will. The court decreed that since the agreement was all to the advantage of the plaintiff, and for her benefit, there could be no recovery. Although the decision is a harsh one, it could probably be explained by the circumstances of the particular case, were it not that the court expressly differs from Loffus *v.* Maw, 8 Jur., N. S., 607, and Coals *v.* Pilkington (*ante*), both of which follow Lord COTTONHAM'S rule, and would seem like extremely fair decisions. In the latter the deceased promised that if the plaintiff would give up her prospect of going into the millinery business, she should have her house during life in which to take boarders. This she did, and occupied the house till the death of the promissor. Vice Chancellor Malins decreed that she should have the house during her life according to the contract. Although the Vice Chancellor "has the misfortune to be frequently overruled," the decision would seem like a sound one, following closely as it does, the earlier cases; and the rule established would seem to be more reasonable than that of the New Jersey Court.

Effect Upon the Promissor.—The effect of such an obligation upon the person making it, has given rise to some interesting discussion. If the contract is to be enforced upon the death of the promissor, shall it not bind him during his life so that he shall not do any act whereby the performance of the agreement on his death shall be rendered impossible? The question has seldom arisen, but where the contract is intended to bind the present property of the parties, or to effect their immediate actions, it will generally be enforced: Lewis *v.* Maddocks, 8 Vesy, 156.

So the court will grant an injunction to restrain the offending party from doing acts which would render the performance of the contract impossible when the proper time arrives, and will set aside, as fraudulent, conveyances which would have that effect: Austin *v.* Davis, 128 Ind., 473; Bird *v.* Pope, 73 Mich., 483.

(The cases under this head have been more fully noted in other parts of this note.)

The effect of a covenant to make a will in a particular manner was before the court in Needham *v.* Kirkman, 3 B. & Ald., 531. "A" covenanted with the trustees of a settlement he had just made, that he would, by will or otherwise, "give and devise all other his real estate and personal estate to, and among, his children, etc." Subsequently, having made an agreement to sell certain of his land, objection was made to the title on account of the covenant. *Held*, that it applied only to the real estate of which he died possessed. Affirmed in Needham *v.* Smith, 4 Russ, 318.

In a case of the kind, however, although the promissor is only bound to dispose of that which he possesses at his death, and retains full control of the property during his life, he will not be permitted to make a contrary disposition in its effect testamentary, or which will be in fraud of those entitled under the agreement: Fortescue *v.* Hannah, 19 Vesy, 67; Randall *v.* Wills, 5 Vesy, 262; VanDuyne *v.* Vree-

land, 11 N. J. Ch., 370; 12 id., 142; Austin *v.* Davis, 128 Ind., 473.

But where a person covenants to let an existing will remain, and subsequently marries, although the marriage will *pro tanto* revoke the will, and so cause a breach of contract, it is said that no action will lie: Pollock on Contracts, 308.

Remedy for Breach.—The remedy in case of the breach of a contract to make a will, of course varies with the relief sought. At law the action is simply for the damage occasioned by the breach, or, perhaps, in a proper case, an action would lie for the specific recovery of the property promised: Newton *v.* Newton, 46 Minn., 33. The important question at law, therefore, is the measure of damages. In equity the courts have endeavored fairly to adjust the rights of the parties, and suit the relief to the particular case. It was said by Justice ROGERS, in Logan *v.* McGinnis, 12 Pa. St., 27, where the agreement was in writing: "Had the will not been made, equity would, no doubt, decree a conveyance, and a jury would give damages to the amount of the value of the land." This is, no doubt, true, where the contract is completely made out, and specific performance will be decreed of a contract to make a will where the intervening equities do not prevent it, and in those cases the parties will be put in as nearly the position they before occupied as possible: Parsons on Contracts, 563 (11); Waterman on Sp. Per., § 41; Young *v.* Young, 45 N. J. Eq., 27; Sharkey *v.* McDermott, 91, No. 647.

In Johnson *v.* Hubble, 5 AM. LAW REG., a young man having conveyed to his sister certain land, in pursuance of a contract with the father, that upon his death he would make an equal distribution of his property betwen the brother and sister, which he failed to do, but gave it all to the sister, the court held that although specific performance could not be decreed because the sister was not a party to the contract, yet she would be compelled to reconvey the land which the brother had conveyed to her as a consideration for the promise with the father. So in Lisle *v.* Tribble, 17 S. W., 742 (Ky.), where a note had been given to the promissor, on the agreement that he would, by will, give the plaintiff its value in land. This he failed to do, and recovery was allowed upon the note on the ground that the consideration for the gift of it had utterly failed: De Moss *v.* Robinson, 46 Mich., 62.

Where the covenant simply is to give a certain amount of money or property, or an amount which may be rendered certain, the court will allow a recovery for such an amount: Mayd *v.* Field, L. R., 3 Ch., 587; Thacker *v.* Key, L. R., 8 Eq., 408; Thompson *v.* Stevens, 71 Pa. St., 161; Cottrell's Estate, 2 W. N. C., 237.

So where the contract was to give an amount equal to what he should give to his younger children, the trustees of the settlement were entitled to recover an amount sufficient to make the share equal, having respect to advancements already made: Wells *v.* Black, 4 Russ., 170.

So where the promise is to compensate for services rendered, or to be rendered, by a provision in the will, or by a definite portion of the estate of the deceased, it would appear that the

injured party, in addition to his action for specific performance, where that is possible, would be entitled to recover on a *quantum meruit* for the reasonable worth of his services: Patterson *v.* Patterson, 13 Johns., 379; Hudson *v.* Hudson, 13 S. E., 583 (Ga.).

Indeed, this form of action would seem to be the most favored, as the courts will require very clear proof of a contract to give a distributive share of the estate, and in Pennsylvania would almost seem to doubt the right to recover it at all: Graham *v.* Graham, 34 Pa. St., 475; Pollock *v.* Ray, 85 Pa. St., 428; Wall's App., 111 Pa. St., 460; Thompson *v.* Stevens, 71 Pa. St., 161.

If the will be made in accordance with the agreement, there can be nothing more required: *In re* Brookman's Trust, L. R.. 5 Ch. App., 183.

So where a son remained with his father, under the expectation that he would be compensated by will, but leaving the amount discretionary with the father, it was held in analogy to ordinary contracts of hiring that he must be satisfied with any provision which may be made, whether it be what was expected or not: Lee's App., 53 Conn., 363; Eaton *v.* Benton, 2 Hill, 578.

Owing to the peculiar wording of our Statute of Frauds, although the land itself cannot be recovered upon a parole contract, there is nothing to prevent an action of damages for the breach. The only question was as to the measure of damages. In the early cases where the contract was oral to give land by will in payment for services, the court distinguished between a contract for the sale of land, and a contract to compensate for services in land, and made the measure of damages in the latter case the value of the land at the time it should have been given, or at the death of the promissor: Bash *v.* Bash, 9 Pa. St., 263; Jack *v.* McKee, 9 Pa. St., 235; Burlingame *v.* Burlingame, 7 Cowen, 92.

But it was soon seen that this was in effect allowing a recovery of land upon a parole contract. This was shown in the dissenting opinion of Justice WOODWARD, in Melaun's Ad. *v.* Amnon, 1 Grant, 123, and when four years later Hertzog *v.* Hertzog, 34 Pa., 475, was argued, the *personnel* of the court having much changed, the old rule was abandoned, and the new one of Justice WOODWARD adopted. It is expressed thus: "A man who contracts for land, and pays the price, but loses it without fraud of the vendor, can at most only recover back his money, or the value of his services rendered, if this is the form in which the consideration was paid." The same change has gone on in the other States, so that now the value of the land has no place in fixing the damages, and an action only lies for a recovery of the consideration paid: Wallace *v.* Long, 105 Ind., 522; Reed on Statute of Frauds, 11, 728.

C. WILFRED CONARD.